No. 79-524

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN A. KAYE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 12-46) is reported at 605 F. 2d 236.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1979 (Pet. App. 11). The petition for a writ of certiorari was filed on September 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether *United States* v. *Chadwick*, 433 U.S. 1 (1977), should apply retroactively.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted of making materially false statements in an application for a loan from a bank insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 2 and 1014 (Count 2), of fraud by wire, in violation of 18 U.S.C. 2 and 1343 (Count 3), and of conspiracy of commit the above offenses, in violation of 18 U.S.C. 371 (Count 1). He was sentenced to consecutive terms of five years' imprisonment on Counts 1 and 3, and a concurrent term of two years' imprisonment on Count 2. The court of appeals affirmed (Pet. App. 12-46).

The evidence is summarized in the opinion of the court of appeals (Pet. App. 13-18). It showed that co-defendant Kitzer had formed and managed several financial institutions in different countries which were in the business of issuing overvalued certificates of deposit and other financial instruments to other corporations. These other corporations would place the falsely inflated assets on their balance sheet for the purpose of improving their apparent financial status. Petitioner became affiliated with this enterprise when he went to co-defendant Bannon, a financial broker, in 1975 to obtain inflated certificates of deposit from Kitzer.

Armed with certificates of deposits secured from Kitzer's operation, petitioner attempted to purchase certain property with the help of a $4.5 million loan from the Lousiville Trust Bank. On March 31, 1977, petitioner met for the first time with officials of the Bank. At that time he presented, among other things, the certificates of deposit and a balance sheet for Globe Natural Gas Company, petitioner's corporation. Petitioner returned to the bank on April 11, 1977, and was arrested under a warrant. At the time that he was arrested, FBI agents

seized the briefcase that he was carrying. Petitioner and the briefcase were taken to the local FBI office. The briefcase was opened at the office and searched without a warrant and without petitioner's consent. Several versions of a Globe Natural Gas Balance sheet were found in the briefcase and were later introduced at petitioner's trial.

ARGUMENT

Petitioner contends that the district court erred in refusing to suppress the items taken from his briefcase. Specifically, he contends (Pet. 4-9) that this Court's decision in *United States* v. *Chadwick*, 433 U.S. 1 (1977), should be applied retroactively, and that on the authority of *Chadwick* the evidence should have been suppressed. The court of appeals, however, properly rejected this claim. Relying on *United States* v. *Peltier*, 422 U.S. 531 (1975), the court correctly concluded that neither the imperative of judicial integrity nor the deterrent purpose served by the exlusionary rule would be served by the retroactive application of the rule established in *Chadwick* in this case (Pet. App. 34-40).

1. Prior to this Court's decision in *Chadwick*, "there was no reason for law enforcement officials to believe that attache cases were not among those personal effects which, under *United States* v. *Robinson*, 414 U.S. 218 * * * (1973), could be seized as part of a 'full search of the person' incident to a lawful arrest, and which, under *United States* v. *Edwards*, 415 U.S. 800 * * * (1974), could be searched several hours after the suspect had been taken into custody." *United States* v. *Berry*, 571 F. 2d 2, 3 (7th Cir.), cert. denied *sub nom. Wilson* v. *United States*, 439 U.S. 840 (1978). Indeed, at the time of the search in this case, the law in the Sixth Circuit upheld searches of suitcases that were within the arrestee's immediate control at the time fo his arrest, even though the suitcase had come under the exclusive control of law enforcement officials at the time of its

seizure. See *United States* v. *Kaye*, 492 F. 2d 744 (6th Cir. 1974). There is thus no suggestion in this case that the officers acted in bad faith or in knowing disregard of their constitutional obligations under Sixth Circuit precedent at the time of the search of petitioner's briefcase.

The court of appeals thus properly concluded that, under this Court's decision in *United States* v. *Peltier*, 422 U.S. 531 (1975), the decision in *Chadwick* should not apply retroactively. As the Court stated in *Peltier* (422 U.S. at 535; footnote omitted):

> [I]n every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application.

See also *Williams* v. *United States*, 401 U.S. 646 (1971); *Desist* v. *United States*, 394 U.S. 244 (1969); *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

2. Petitioner's claim (Pet. 5) that the Court applied *Chadwick* retroactively in *Arkansas* v. *Sanders*, No. 77-1497 (June 20, 1979), is incorrect. It is true that *Sanders* employed aspects of the reasoning employed in *Chadwick*, but *Sanders* did not state or imply that *Chadwick* was to have retroactive application. Indeed, retroactivity was not discussed in *Sanders* at all, and that case thus did not establish retroactivity guidelines of general applicability. See *United States* v. *Peltier*, *supra*, 422 U.S. at 535 n.5.

Nor did the Court's remand of *Schleis* v. *United States*, 543 F. 2d 59 (8th Cir. 1976), vacated and remanded, 433 U.S. 905 (1977), imply that *Chadwick* was to receive

retroactive effect. The remand suggested only that the Eighth Circuit was to determine, in the first instance, whether the facts of *Schleis* fell within the rule established in *Chadwick* and, if so, whether *Chadwick* should be applied retroactively (Pet. App. 39). The Eighth Circuit's conclusion on remand in *United States* v. *Schleis*, 582 F. 2d 1166, 1173 n.6 (1978), that there was "no reason" for remanding the case unless this Court intended *Chadwick* to be applied retroactively was thus, in our view, erroneous.[1]

Moreover, the holding of *Schleis* that *Chadwick* should be applied retroactively does not create a conflict in the circuits of sufficient consequence to warrant resolution by this Court. Every other court to have addressed the question has concluded that *Chadwick* should not be applied retroactively, and this Court has declined to review those rulings. See *United States* v. *Berry*, *supra*; *United States* v. *Reda*, 563 F. 2d 510, 512 (2d Cir. 1977), cert. denied, 435 U.S. 973 (1978); *United States* v. *Montgomery*, 558 F. 2d 311, 312 (5th Cir.), cert. denied, 434 U.S. 927 (1977); *United States* v. *Mancillas*, 580 F. 2d 1301, 1306-1307 (7th Cir.), cert. denied, 439 U.S. 958 (1978); *United States* v. *Choate*, 576 F. 2d 165, 182 n.20 (9th Cir.), cert. denied, 439 U.S. 953 (1978). There is no reason for this Court to reach a different result in this case; the decision in *Chadwick* is now nearly two and a half years old, and there remain relatively few cases likely to be affected by the retroactivity question.

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[1]Retroactive application of *Chadwick* was particularly inappropriate in the Eighth Circuit in light of the established pre-*Chadwock* law in that circuit upholding similar warrantless searches based on probable cause. See *United States* v. *Schleis*, 543 F. 2d 59 (1976); *United States* v. *Wilson*, 524 F. 2d 595, cert. denied, 424 U.S. 945 (1975); *United States* v. *Buckhanon*, 505 F. 2d 1079 (1974).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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